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Article 9

Recent Decisions: Wills: Effect of Provision Designating Attorney for Executor

John P. Foley

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.[13]

In the field of conflicts between the "cash sale" and the "voidable title" doctrines, the Uniform Commercial Code has adopted and clarified the "voidable title" doctrine. The Code has taken scrambled and unreliable word formulas, and from these has promulgated several sections which should fit the needs of the commercial law dealing with good faith purchasers for value and with questions arising between the seller and buyer. The Code's desire to increase the marketability of goods in the open market is readily apparent.

CHARLES J. HARTZHEIM

Wills: Effect of Provision Designating Attorney for Executor: In *Estate of Sieben*[1] the testator had designated both an executor and an attorney for the executor. After admission of the will to probate and issuance of letters testamentary to the executor, the executor having refused to retain the services of the named attorney, the latter initiated the instant proceeding in the lower court by affidavit and order to show cause why he should not be retained as attorney for the executor. The lower court upheld the designation and issued an order appointing the attorney, from which order the executor appealed. The Wisconsin Supreme Court, reversing the lower court, held that "in the absence of a statement of intent in the will that a named attorney be employed by the personal representative even at the cost of the resignation of the personal representative, an executor is not required to employ an attorney in opposition to the executor's own wishes."[2] Although the court did not uphold this testamentary designation of the attorney, the implication of the language quoted above is that where there was an adequate expression of an intention that the named attorney be retained even at the cost of the resignation of the executor, the designation would be upheld.[3]

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[13] UNIFORM COMMERCIAL CODE § 3-802.

[1] 24 Wis. 2d 166, 128 N.W. 2d 443 (1964).

[2] *Id.* at 170, 128 N.W. 2d at 445.

[3] See ECKHARDT, WORKBOOK FOR WISCONSIN ESTATE PLANNERS § 3(D)(0.2) (1961), for a suggested clause conditioning appointment of the executor on his retaining the services of a designated attorney.

The implication is not novel nor should the decision have been unexpected. In *Estate of Braasch,*[4] involving a fact situation similar to the principal case, Justice Fairchild concluded that the intent of the testator was that the executor should serve even though he refused to retain the named attorney. This conclusion was one of the determining factors in the court's refusal to uphold the attorney designation there. As a determining factor, it necessarily gives rise to the same implication more patently illustrated by the principal case.

The above two cases, along with *Estate of Ogg,*[5] establish Wisconsin as one of two states which, in appropriate fact situations, enforce testamentary designation of an attorney.[6] However, an examination of these cases reveals a question not yet adequately considered by the Wisconsin Supreme Court. By what right does the designated attorney bring an action against an executor to enforce the testamentary designation? Because nearly all other jurisdictions refuse to enforce the testamentary designation of an attorney, it is necessary to resort to cases involving testamentary designations of persons to perform other types of services in an attempt to discover why such persons can enforce the designation.

In *Shaw v. Lawless,*[7] the testator had devised lands to defendant Shaw with direction to employ Lawless in the receipt and management thereof, "he having acted for me since I became possessed of said estate fully to my satisfaction," Lawless contended that the will created a trust in his favor.[8] In refuting this contention, the court employed this analogy:

> [I]f a testator should say that he desired his son to be educated at a particular school, that would create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit not of the master but of the scholar.[9]

It was held that no trust was created, since the testator did not intend to create an interest for the benefit of Lawless. Absent such an interest, the designee had no cause of action.

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[4] 274 Wis. 569, 80 N.W. 2d 759 (1957).
[5] 262 Wis. 181, 54 N.W. 2d 175 (1952).
[6] The majority view is that a testamentary direction to employ a named attorney is unenforceable. Wisconsin and Louisiana are opposed. SCOTT, TRUSTS § 126.3 (2d ed. 1956).
[7] 5 Cl. & Fin. 129, 7 E.R. 353 (1838).
[8] Two earlier decisions had upheld similar testamentary directions where the designated person was to be employed by the trustees of an express trust created in the will, the designee being considered one of the trust beneficiaries. Hibbert v. Hibbert, 3 Mer. 681, 36 E.R. 261 (1808); Williams v. Corbet, 8 Sim. 349, 59 E.R. 138 (1837).
[9] 7 E.R. at 362.

Professor Scott,[10] in discussing testamentary trusts involving a direction that the trustees employ a designated person, establishes three categories of intent which might prompt such a direction. The direction could have been made (1) for the sole benefit of the designated person, (2) for the mutual benefit of the designated person and the cestui que trust, or (3) for the sole benefit of the cestui que trust.[11] Where the direction was made at least in part for the benefit of the designated person, he may be considered a beneficiary under the trust and thereby have an enforceable right. However, Scott states that where the direction to employ is for the sole benefit of the cestui que trust, "the designated person, although he might benefit by the employment, is not a beneficiary of the trust and has no standing to compel the trustee to employ him."[12]

There is no compelling reason for limiting the above discussion to persons designated for employment under an express trust created by will. The important consideration is the testator's intent in inserting the testamentary direction to employ. The discussion would thus appear to be applicable to situations paralleling that in the principal case; that is, where a testator directs his executor to retain the services of a designated attorney. We also have the same parallel situation in the *Shaw* case and in the example of the schoolmaster. If these tests were applied to the problem of whether the attorney has a right to enforce his designation as attorney for the executor, language of the sort used in the will in the principal case—"in view of [his] complete familiarity with my estate and financial affairs"[13]—is likely to be insufficient to create an enforceable right in the attorney, as it expresses only an intent to benefit the estate.

However, in Wisconsin we find some support for the proposition that the attorney so designated in the will takes a beneficial interest under the will. In *Estate of Ogg*,[14] the attorney designated in the will to serve as attorney for the administrator with the will annexed petitioned the court for appointment. The lower court dismissed the petition and the attorney appealed. On appeal, respondent contended that the attorney was not a party aggrieved and therefore had no right to appeal the decision of the trial court. The supreme court, in holding the petitioner to be an aggrieved party, quoted with approval the following:

> A party is aggrieved if he would have had the thing if the erroneous judgment had not been given. Or . . . whenever it operates

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[10] Dane Professor of Law Emeritus at Harvard University and reporter on trusts for the American Law Institute.
[11] Scott, *Testamentary Directions to Employ*, 41 HARV. L. REV. 709, 712 (1928).
[12] *Ibid.*
[13] Estate of Sieben, *supra* note 1, at 167, 128 N.W. 2d at 444; *cf.* the language suggested by ECKHARDT, *op. cit. supra* note 3.
[14] 262 Wis. 181, 54 N.W. 2d 175 (1952).

> on his rights of property or bears directly upon his *interest.* A broader . . . definition is that an aggrieved party . . . is one having an *interest* recognized by law in the subject matter which is injuriously affected by the judgment.[15] (Emphasis added.)

To be aggrieved the party must have an interest in the subject matter, and to hold that the attorney was aggrieved was to hold that he had an interest taken by reason of his designation in the will. A former Wisconsin probate judge[16] has interpreted the *Ogg* case to mean that since an attorney designated in the will is an interested party with a right of appeal, he must be listed in the petition for probate of the will.[17] Persons who must be listed in the petition for probate of the will include "legatees and devisees" plus any surviving spouse and heirs not named as beneficiaries in the will.[18]

This classifies the attorney as a beneficiary, and, in the event of a will contest, problems could arise under section 238.08 of the Wisconsin statutes[19] since it is common practice in Wisconsin for an attorney drafting a will to sign as one of the witnesses.[20] In an Illinois case, *Estate of George,*[21] the attorney designated in the will was retained by the executor. An action was commenced by the beneficiaries for disallowance of the fee paid to the attorney for his work. Under the Illinois statutes,[22] if any beneficial interest is given in a will to a person attesting its execution, the interest is void as to that beneficiary.[23] Here the attorney was one of the attesting witnesses, and it was held that he could not receive any financial remuneration for his services since his designation in the will constituted a beneficial interest under the will.[24]

There may also be certain ethical considerations involved in an

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[15] *Id.* at 192, 54 N.W. 2d at 180.

[16] Kroncke, *A Decade of Probate Law,* 1961 WIS. L. REV. 82, 101.

[17] WIS. STAT. § 310.045(1) (1963) requires that "all petitions . . . show the names . . . of all persons interested. . . ." Other possible ramifications of considering the attorney as an interested party are that notice would probably have to be given to the attorney under §§ 310.04 and 324.18 unless he was retained, in which case he would be making a general appearance under § 324.18(3). Likewise, the attorney would probably have to consent to "waiver of notice" under § 310.05(1), which he would be unlikely to do if not retained by the executor.

[18] WIS. STAT. § 310.045(2) (1963): "In a petition for probate of a will . . . the legatees and devisees and the surviving spouse and heirs of the decedent are persons interested."

[19] Section 238.08 reads as follows: "All beneficial devises, legacies, and gifts whatsoever, made or given in any will to a subscribing witness thereto . . . shall be wholly void unless there be two other competent subscribing witnesses to the same. . . ."

[20] This facilitates proof of the will where there is no contest under § 310.06(1).

[21] 11 Ill. App. 2d 359, 137 N.E. 2d 555 (1956).

[22] ILL. REV. STAT. ch. 3, § 195 (1953).

[23] This is similar to § 238.08 of the Wisconsin statutes.

[24] It should be noted that the interest of the attorney was considered to be merely a contingent or uncertain interest, dependent upon the executor's acquiesence in the testamentary direction. Illinois, like most jurisdictions, note 6 *supra,* does not consider the executor bound by a direction to employ the designated attorney.

attorney taking this type of beneficial interest under the will. In *State v. Horan*,[25] the court mentions as some of the considerations involved,

> the conflict of interests, the incompetence of an attorney-beneficiary to testify because of a transaction with the deceased (sec. 325.16, Stats.), the possible jeopardy of the will if its admission to probate is contested, the possible harm done to other beneficiaries and the undermining of the public trust and confidence in the integrity of the legal profession. . . .[26]

In conclusion, in Wisconsin it appears that an attorney designated in a will as attorney for the executor takes an enforceable interest by reason of the designation if the executor's appointment is conditioned upon retention of the designated attorney. As yet, the precise nature of this interest has not been fully considered, nor have possible ramifications such as those discussed above. It would thus seem appropriate for the Wisconsin Supreme Court to reconsider at the first opportunity presented whether the attorney-designee should have a right to enforce his designation; and if so, on what basis.

JOHN P. FOLEY

Evidence: Admissibility of a Doctor's Testimony as to His Patient's Subjective Symptoms: In *Ritter v. Coca Cola Co.*,[1] plaintiff sued for psychological injuries that occurred when she drank a bottle of Coca-Cola and discovered portions of a decomposed mouse inside. Plaintiff retained counsel the next day and then consulted a doctor concerning any possible physical injuries, but none were found. Upon continuing emotional distress, she visited a psychiatrist and recounted to him her symptoms of loss of sleep, fear of mice, and fear of non-translucent liquids. At the trial, after the psychiatrist had testified in her favor, plaintiff recovered $2,500 for the injuries incurred.

Defendant appealed the trial court ruling admitting into evidence the psychiatrist's testimony as to his patient's subjective symptoms. Defendant contended that to allow this doctor to testify after plaintiff retained counsel was in direct contravention of the court's previous holding in *Kath v. Wisconsin Cent. Ry.*[2] and other subsequent cases.[3] The supreme court affirmed, and expressly overruled the *Kath* case.

It has long been recognized as a valid exception to the hearsay rule, that a doctor may testify as to subjective symptoms which are related to him by his patient. It is asserted that declarations made by a person to his physician while receiving treatment are trustworthy and should

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[25] 21 Wis. 2d 66, 123 N.W. 2d 488 (1961).
[26] *Id.* at page 70, 123 N.W. 2d at 490.
[1] 24 Wis. 2d 157, 128 N.W. 2d 439 (1964).
[2] 121 Wis. 503, 99 N.W. 217 (1904).
[3] See Thompson v. Nee, 12 Wis. 2d 326, 107 N.W. 2d 150 (1961); Plesko v. City of Milwaukee, 19 Wis. 2d 210, 120 N.W. 2d 130 (1963).